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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**

10 RODGER DEAN ANDERSON,

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12 Plaintiff,

13 v.

14 CREDIT ONE BANK, NATIONAL
ASSOCIATION,

15 Defendant.
16

Case No.: 16cv3125-MMA (AGS)

**ORDER DENYING DEFENDANT'S
MOTION TO STAY**

[Doc. No. 26]

17
18 Plaintiff Rodger Dean Anderson (“Plaintiff”) brings this action against Defendant
19 Credit One Bank, National Association (“Defendant” or “Credit One Bank”) alleging
20 three causes of action for: (1) violations of California’s Rosenthal Fair Debt Collection
21 Practices Act, California Civil Code § 1788 *et seq.*; (2) violations of the Telephone
22 Consumer Protection Act (“TCPA”), 47 U.S.C. § 227 *et seq.*; and (3) intrusion. *See*
23 Complaint. Defendant moves to stay this action. *See* Doc. No. 26. Plaintiff filed an
24 opposition, to which Defendant replied. *See* Doc. Nos. 28, 29. The Court found the
25 matter suitable for determination on the papers and without oral argument pursuant to
26 Civil Local Rule 7.1.d.1. *See* Doc. No. 30. For the reasons set forth below, the Court
27 **DENIES** Defendant’s motion to stay.

28 ///

1 **BACKGROUND**

2 Plaintiff, a resident of California, applied online for a credit card with Credit One
3 Bank. Upon approval, Credit One Bank mailed Plaintiff a credit card. Plaintiff activated
4 his credit card in February 2015, and began using his credit card for personal and
5 household purposes. In June 2015, Plaintiff closed his credit card account “after paying
6 off the remaining balance.” Complaint ¶ 15.

7 Approximately four (4) months later, Credit One Bank began telephoning Plaintiff
8 and demanding payment. Complaint ¶ 16. Plaintiff claims Credit One Bank used an
9 “automatic telephone dialing system” (“ATDS”) in violation of the TCPA. Complaint ¶
10 20. Plaintiff asserts he notified Credit One Bank that there was a \$0.00 balance on his
11 account. Complaint ¶ 16. Credit One Bank informed Plaintiff that Plaintiff had not paid
12 the annual card fee. *See* Complaint ¶ 17. Plaintiff then paid the annual fee, but continued
13 to receive phone calls from Credit One Bank demanding payment for the annual credit
14 card fee. Complaint ¶ 19. Plaintiff contends Credit One Bank continued making calls,
15 often multiple times per day, in an attempt to collect this debt from Plaintiff. *See*
16 Complaint ¶ 20. Plaintiff further alleges that Credit One Bank “would often leave
17 recorded messages using an artificial voice.” Complaint ¶ 27. Plaintiff asserts he “has
18 never given Defendant permission to call his cellular phone and if Defendant did have
19 authorization, Plaintiff rescinded this authorization numerous times.” Complaint ¶ 25.

20 **LEGAL STANDARD**

21 “A district court has discretionary power to stay proceedings in its own court
22 under *Landis v. North American Co.*” *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1109 (9th
23 Cir. 2005) (citing *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936)). “The power to stay a
24 case is ‘incidental to the power inherent in every court to control the disposition of the
25 causes on its docket with economy of time and effort for itself, for counsel, and for
26 litigants.’” *Halliwell v. A-T Sols.*, 2014 WL 4472724, at *7 (S.D. Cal. Sept. 10, 2014)
27 (quoting *Landis*, 299 U.S. at 254). A district court may stay a case “pending resolution of
28 independent proceedings which bear upon the case,” even if those proceedings are not

1 “necessarily controlling of the action before the court.” *Leyva v. Certified Grocers of*
2 *Cal., Ltd.*, 593 F.2d 857, 863–64 (9th Cir. 1979). However, “[o]nly in rare circumstances
3 will a litigant in one cause be compelled to stand aside while a litigant in another settles
4 the rule of law that will define the rights of both.” *Landis*, 299 U.S. at 255.

5 In determining whether to grant a stay pursuant to *Landis*, courts in the Ninth
6 Circuit weigh the “competing interests which will be affected by the granting or refusal to
7 grant a stay,” including “the possible damage which may result from the granting of a
8 stay, the hardship or inequity which a party may suffer in being required to go forward,
9 and the orderly course of justice measured in terms of the simplifying or complicating of
10 issues, proof, and questions of law which could be expected to result from a stay.” *See*
11 *Lockyer*, 398 F.3d at 1110 (quoting *CMAX, Inc. v. Hall*, 300 F.2d 265, 268 (9th Cir.
12 1962)). The burden is on the movant to show that a stay is appropriate. *See Clinton v.*
13 *Jones*, 520 U.S. 681, 708 (1997).

14 DISCUSSION

15 **A. Defendant’s Request for Judicial Notice**

16 As an initial matter, Defendant requests the court take judicial notice of five
17 exhibits in connection with its motion to stay. *See* Doc. No. 27. Specifically, Defendant
18 requests the Court take judicial notice of: (1) the Second Amended Petition filed in *ACA*
19 *International v. Fed. Comm’ns Comm’n*, Appeal No. 15-1211 (D.C. Cir.); (2) the docket
20 in *Marks v. Crunch San Diego, LLC*, a case on appeal in the Ninth Circuit, No. 14-56834;
21 (3) a district court’s order granting the defendant’s motion to stay in *Bowden v. Contract*
22 *Caller, Inc.*, 16-cv-6171-MMC (N.D. Cal. Apr. 5, 2017); (4) a district court’s order
23 granting the defendant’s motion to stay in *Roark v. Credit One Bank, N.A.*, 16-cv-00173-
24 RHK-FLN (D. Minn. Dec. 6, 2016); and (5) a district court’s order granting the
25 defendant’s motion to stay in *Kristensen v. Credit One Bank, N.C.*, 14-cv-7963-DMG-
26 AJWX (C.D. Cal. July 28, 2016). *See id.* Plaintiff did not file an opposition to
27 Defendant’s request for judicial notice.

28 Regarding Defendant’s requests for judicial notice of Exhibits 1 and 2, a court may

1 take judicial notice of matters of public record. *Lee v. City of Los Angeles*, 250 F.3d 668,
2 688-89 (9th Cir. 2001) (citing *Mack v. South Bay Beer Distrib.*, 798 F.2d 1279, 1282 (9th
3 Cir. 1986)). Because Plaintiff does not dispute the authenticity of these documents, and
4 because the facts are not subject to reasonable dispute, the Court **GRANTS** Defendant's
5 request for judicial notice of Exhibits 1 and 2. *See* Fed. R. Evid. 201(b).

6 Regarding Defendant's request for judicial notice of Exhibits 3-5, to the extent
7 Defendant seeks to establish the existence of Exhibits 3-5, the Court **GRANTS**
8 Defendant's request for judicial notice. However, to the extent Defendant seeks to
9 provide supplemental authority for the Court's consideration, such a request is
10 misguided. *See In re Bare Escentuals, Inc. Sec. Litig.*, 745 F. Supp. 2d 1052, 1067 (N.D.
11 Cal. 2010) ("[t]he court may take judicial notice of the existence of unrelated court
12 documents, although it will not take judicial notice of such documents for the truth of the
13 matter asserted therein."); *see also Garcia v. California Supreme Court*, 2014 WL
14 309000, at *1 (N.D. Cal. Jan. 21, 2014) ("a request for judicial notice is not a proper
15 vehicle for legal argument.").

16 **B. Defendant's Motion to Stay**

17 Defendant moves to stay this action pending the outcome of the D.C. Circuit
18 Court's decision in *ACA International v. Fed Commc'ns Comm'n*, Appeal No. 15-1211
19 (D.C. Cir.), in which the D.C. Circuit has been asked to review various aspects of an
20 order issued by the Federal Communications Commission ("FCC") (hereinafter "2015
21 FCC Order"). In its order, the FCC clarified various provisions of the TCPA, including
22 the definition of ATDS and revocation of consent. *See* Defendant's Request for Judicial
23 Notice (hereinafter "RJN"), Exh. 1. Defendant argues the ruling in *ACA International*
24 will affect two issues in this case: whether Defendant used an ATDS, and whether
25 Plaintiff effectively revoked any prior express consent. Defendant also notes that the
26 Ninth Circuit has stayed its review of *Marks v. Crunch San Diego*, 55 F. Supp. 3d 1288
27 (S.D. Cal. 2014), a case regarding the definition of an ATDS, pending the D.C. Circuit's
28 decision in *ACA International*. *See* RJN, Exh. 2. Defendant claims the D.C. Circuit's

1 ruling “will have a domino effect on the Ninth Circuit’s construction of an ATDS.” Doc.
2 No. 26-1 at 2.

3 Plaintiff opposes Defendant’s motion, arguing the ruling in *ACA International* will
4 likely not impact the issues in this case, and that Defendant has not demonstrated it will
5 suffer hardship in the absence of a stay. *See* Doc. No. 28. In ruling on the instant
6 motion, the Court considers: (1) whether a stay supports judicial economy; (2) whether
7 Defendant will suffer hardship or inequity in the absence of a stay; and (3) prejudice to
8 Plaintiff. *See Lockyer*, 398 F.3d at 1110.

9 ***1. Judicial Economy***

10 The Court must consider whether a stay would promote “the orderly course of
11 justice measured in terms of the simplifying . . . of issues, proof, and questions of law.”
12 *Lockyer*, 398 F.3d at 1110. Defendant contends the D.C. Circuit’s ruling in *ACA*
13 *International* will narrow key factual and legal issues including the FCC’s definition of
14 an ATDS and whether a consumer may revoke consent. *See* Doc. No. 26-1 at 5. In
15 response, Plaintiff asserts it is speculative whether the decision in *ACA International* will
16 even apply to this case. *See* Doc. No. 28 at 5.

17 The Court is not persuaded that a stay pending the D.C. Circuit’s ruling in *ACA*
18 *International* would promote judicial economy in this case. Plaintiff asserts two theories
19 in support of his TCPA claim. Plaintiff alleges Defendant used both an ATDS and an
20 “artificial voice.” Complaint ¶¶ 20, 27. A plaintiff may bring a claim under the TCPA
21 by alleging that the defendant called him or her using *either* an ATDS *or* an artificial
22 voice. *See* 47 U.S.C. § 227(b)(1) (emphasis added). As a result, Plaintiff’s TCPA claim
23 will remain even if the D.C. Circuit’s ruling impacts the definition of an ATDS. *See*
24 *Declue v. United Consumer Fin. Servs. Co.*, 2017 WL 4541668, at *2 (S.D. Cal. Oct. 11,
25 2017); *Mendez v. Optio Sols., LLC*, 239 F. Supp. 3d 1229, 1233 (S.D. Cal. 2017)
26 (“[B]ecause Plaintiff alleges Defendant violated the TRCPA through ***both*** the use of an
27 ATDS and an artificial or prerecorded voice, Plaintiff’s TCPA claim will stand despite
28 the ATDS allegations.”) (emphasis in original). Moreover, “discovery regarding the type

1 of calling system Defendant uses will be necessary to determine whether it fits any
2 definition of ATDS, whether it will be that of the 2015 FCC Order or a new definition
3 provided by the D.C. Circuit.” *Declue*, 2017 WL 4541668, at *2.

4 Further, regardless of the D.C. Circuit’s ruling in *ACA International*, the parties
5 will need to conduct discovery on the issue of consent. Plaintiff argues he never
6 consented to the calls, but that even if he did, he “rescinded this authorization numerous
7 times.” Complaint ¶ 25. Thus, if Plaintiff did authorize such calls, the parties will need
8 to conduct discovery on the issue of revocation. As another court in this district recently
9 noted,

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11 If the D.C. Circuit upholds the 2015 FCC Order, the parties will need to
12 conduct discovery to determine whether [the plaintiffs’] revocation of
13 consent was effective. If the 2015 FCC Order’s ruling on consent revocation
14 does not survive, the parties will still need to conduct similar discovery, only
under Ninth Circuit precedent.

15 *Declue*, 2017 WL 4541668, at *2 (citing *Van Patten v. Vertical Fitness Grp., LLC*, 847
16 F.3d 1037, 1047 (9th Cir. 2017) (holding that consumers may revoke their prior express
17 consent under the TCPA, even if the D.C. Circuit invalidates the 2015 FCC Order).

18 Plaintiff also argues that the decision by the D.C. Circuit Court is not binding on
19 this Court. Though district courts have reached different conclusions on the precedential
20 effect of the D.C. Circuit’s ruling in *ACA International*, the Court need not resolve this
21 issue at this time. *See Cabiness v. Educ. Fin. Solutions, LLC*, 2017 WL 167678, at *3
22 (N.D. Cal. Jan. 17, 2017) (“Although the *ACA Int’l* decision will be binding on this
23 Court, there is currently no live ATDS issue with respect to the Plaintiff in this case.”);
24 *cf. O’Hanlon v. 24 Hour Fitness USA, Inc.*, 2016 WL 815357, at *5 (N.D. Cal. Mar. 2,
25 2016) (noting “any decision from the D.C. Circuit would not be binding on this Court”).
26 However, as Plaintiff notes, the losing party in *ACA International* will likely petition the
27 U.S. Supreme Court for review, “making it impossible to forecast if or when a decision in
28 *ACA International* will become final.” *Hiemstra v. Credit One Bank*, 2017 WL 4124233,

1 at *2 (E.D. Cal. Sept. 15, 2017). Thus, Defendant has not shown a stay would promote
2 judicial economy.

3 **2. Hardship or Inequity**

4 The Court must also consider the “hardship or inequity which a party may suffer in
5 being required to go forward” with the case. *Lockyer*, 398 F.3d at 1110. Defendant relies
6 exclusively on the cost and burden of defending a lawsuit in arguing it will suffer
7 hardship. “[B]eing required to defend a suit, without more, does not constitute a ‘clear
8 case of hardship or inequity’ within the meaning of *Landis*.” *See Lockyer*, 398 F.3d at
9 1112. Defendant’s reliance on *Bowden v. Contract Callers, Incorporated*, is misplaced,
10 as the district court there noted the defendant “would be harmed by burdensome class
11 discovery.” 2017 WL 1732017, at *2 (N.D. Cal. Apr. 5, 2017). Because this case does
12 not involve class allegations, there is no such risk present here. Moreover, Plaintiff
13 asserts the magistrate judge “has already limited the number and scope of discovery in
14 this case.” Doc. No. 28 at 2. Thus, Defendant has not made out “a clear case of hardship
15 or inequity.” *Landis*, 299 U.S. at 255.

16 **3. Prejudice**

17 Lastly, staying this case would prejudice Plaintiff. Defendant filed its motion more
18 than eight months after Plaintiff filed his Complaint. *See Hiemstra*, 2017 WL 4124233,
19 at *3 (noting a stay would prejudice the plaintiff where the defendant filed its motion
20 more than eight months after the plaintiff filed her complaint and discovery had not yet
21 commenced). Of significance is the fact that Defendant must still produce discovery to
22 settle the factual disputes regarding the use of an alleged artificial voice and whether
23 Defendant previously obtained Plaintiff’s consent. Additionally, Plaintiff’s artificial
24 voice basis for his TCPA claim, his Rosenthal Act claim, and his intrusion claim will all
25 remain regardless of the outcome in *ACA International*. Thus, imposing a stay will
26 prejudice Plaintiff.

27 In sum, in weighing the relevant factors, the Court is unconvinced that a stay is
28 warranted in this case. The Court finds Defendant has not shown this is one of those

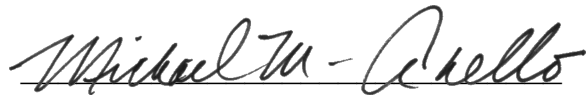
1 “rare” circumstances where a party in one case must “stand aside while a litigant in
2 another settles the rule of law that will define the rights of both.” *Landis*, 299 U.S. at
3 255.

4 **CONCLUSION**

5 Based on the foregoing, the Court **DENIES** Defendant’s motion to stay
6 proceedings pending the D.C. Circuit’s ruling in *ACA International*.

7 **IT IS SO ORDERED.**

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9 Dated: October 17, 2017

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11 HON. MICHAEL M. ANELLO
12 United States District Judge
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